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RECORDATION NO 16619 FILED 1425

NOV 21 1989 - 12 55 PM

November 21, 1989

INTERSTATE COMMERCE COMMISSION

9-325A017

The Honorable Noreta R. McGee
Secretary
Interstate Commerce Commission
Washington, D.C. 20423

Dear Secretary McGee:

Enclosed for recordation, under the provisions of 49 U.S.C. §11303(a) and the regulations thereunder, are an original and five counterparts of a Temporary User Agreement, dated as of November 9, 1989, between General Electric Company ("Vendor"), and The Monongahela Railway Company ("Temporary User"), a primary document.

The names and addresses of the parties to the enclosed Temporary User Agreement are as follows:

VENDOR: General Electric Company
2901 East Lake Road
Erie, Pennsylvania 16531

TEMPORARY USER: The Monongahela Railway Company
Attention: D. A. Caldwell
53 Market Street
Union Station Building
Brownsville, Pennsylvania 15417

A general description of the railroad locomotives covered by the enclosed documents is attached hereto as Schedule I.

The undersigned is the attorney-in-fact of General Electric Company. Please return the original of the enclosed document to John K.

John K. Maser

Letter to Secretary McGee

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Maser III, Esquire, Donelan, Cleary, Wood & Maser, P.C., Suite 850, 1275 K Street, N.W., Washington, D.C. 20005-4006 or to the bearer hereto.

Also enclosed is a remittance in the amount of \$15.00 for the required recording fee.

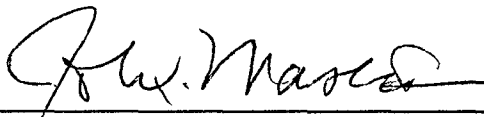
A short summary of the document to appear in the index follows:

PRIMARY DOCUMENT

Temporary User Agreement, dated as of November 9, 1989, between General Electric Company ("Vendor") and The Monongahela Railway Company ("Temporary User"), relating to eleven (11) General Electric Super 7 B23 Diesel Electric Locomotives, bearing identification marks "Monongahela" and Road Nos. 2300 to 2310, inclusive.

Respectfully submitted,

By:



John K. Maser III
Attorney-In-Fact

004/FS
Enclosures

Schedule I

Description of Locomotives

| <u>Type of Equipment</u> | <u>Number</u> | <u>Identifying Marks</u> | <u>Road Numbers</u> |
|--|---------------|---|----------------------------|
| General Electric 2300 HP, Super 7 B-23, Diesel Electric Locomotives | 11 | Marked "Monongahela" on both sides of locomotive | 2300 to 2310, inclusive |

Temporary User Agreement Between General Electric Company and
The Monongahela Railway Company.

RECORDATION NO **16619** FILED 1425

Dated as of November 9, 1989

NOV 21 1989 - 12 55 PM

INTERSTATE COMMERCE COMMISSION

This is a TEMPORARY USER AGREEMENT, dated as of November 9, 1989, between General Electric Company, a New York corporation (the "Vendor"), and The Monongahela Railway Company, a Pennsylvania corporation (the "Railroad")

Whereas, Railroad has contracted with Vendor to build 11 Super 7 B23 Locomotives; and

Whereas, inasmuch as railroad has not consummated financing arrangements for the acquisition of the Locomotives, it is not in a position to accept delivery of the Locomotives at this time; and

Whereas, Railroad anticipates that the financing arrangements will be consummated on or before December 28, 1989, and Railroad, in order that it may take possession of and use the Locomotives pending completion of the financing arrangements, has requested Vendor to grant railroad temporary possession of and the right to use the Locomotives pursuant to the terms of this Agreement; and

Whereas, Vendor is willing to grant such right to use the Locomotives upon the terms and conditions hereinafter stated:

Now, therefore, in consideration of the mutual promises, covenants and agreements hereinafter set forth, the Vendor and the Railroad hereby agree as follows:

1. Vendor will deliver the Locomotives to the Railroad f.o.b. to Railroad at Brownsville, PA. The Vendor's obligation as to time of delivery is subject, however, to delays resulting from causes beyond the Vendor's reasonable control. Upon delivery of each Locomotive to the Railroad, an authorized representative of the Railroad will execute and deliver to the Vendor a certificate of acceptance in the form of Schedule B hereto certifying, if such be the case, that such unit appears to have been built in accordance with the specifications therefor and acknowledging receipt of delivery thereof under this Agreement, whereupon the Railroad shall assume the responsibility and risk of loss not caused by Vendor with respect to such unit so accepted.

2. The rights of the Railroad hereunder in respect of each Locomotives shall commence on the date of acceptance of such Locomotives hereunder and end on December 28, 1989, or earlier as hereinafter provided. Title to Locomotive shall remain in Vendor, and the Railroad's right and interest therein is and shall be solely

that of possession, custody and use under this Agreement. The Railroad or any third party acquiring an interest in the Locomotives by reason of the conditional sale, equipment trust or other financing shall not by virtue of this Agreement or the possession and use of the Locomotives by the Railroad under or pursuant to this Agreement or of anything permitted to be done by the Railroad hereunder in respect of the Locomotives, or any unit thereof, and the title to or ownership of the Locomotives shall remain solely in the Vendor. The terms of this Agreement shall automatically be superseded and canceled without further action by or notice to any party concerned as to each Locomotive by the terms of any lease, conditional sale agreement or other equipment financing agreement at the earlier to occur at the time of the payment to the Vendor of the purchase price of such unit or the time of filing with the Interstate Commerce Commission of said lease, conditional sale or other equipment financing agreement covering such unit, except the terms of paragraphs 4 and 7 hereof (to the extent not covered as respects General Electric Company or any assignee of its rights hereunder by the financing arrangements).

This "Temporary User Agreement" is a financial arrangement, under which Railroad will have custody, possession and use of the Locomotives purchased from Vendor, and the risk of loss of the Locomotives not caused by Vendor is on the Railroad.

3. The initial unit price and initial total price of the Locomotives are set forth in Schedule A hereto. If the Vendor does not receive the purchase price of each Locomotive pursuant to the financing arrangements, the Railroad will be obligated to pay such purchase price.

4. The Railroad agrees that it will permit no lien of any kind to attach to the Locomotives and that it will pay promptly all taxes and assessments which may accrue or be imposed upon or in respect of the Locomotive's use by reason of or in connection with the Railroad's possession, use or operation thereof under this Agreement. The Railroad's obligations contained in this paragraph 4 shall survive the termination of this Agreement.

5. Railroad shall, at its own expense, keep and maintain the Locomotives in good order and repair at all times. The Railroad shall pay to the Vendor the actual purchase price of each Locomotive lost, destroyed or irreparably damaged, except insofar as the loss, destruction, or damage is the result of action or inaction of the Vendor or its agents, during the term of this Agreement.

6. Prior to delivery of each Locomotive, it will be numbered with the appropriate road number set forth in Schedule A hereto. In contemplation of subsequent delivery of the Locomotives under the financing arrangements, the railroad will, throughout the term of this Agreement, keep and maintain plainly, distinctly, permanently and

conspicuously marked in stencil on each side of each Locomotive, in letters not less than one inch in height, the following legend:

**OWNERSHIP SUBJECT TO A SECURITY AGREEMENT FILED
WITH THE INTERSTATE COMMERCE COMMISSION**

7. The Railroad shall indemnify, protect and hold harmless the Vendor from and against all losses, damages, injuries, liabilities, claims and demands whatsoever, other than those caused by Vendor, regardless of the cause thereof, regardless of the cause thereof, and expenses in connection therewith, including counsel fees, arising out of retention by the Vendor of title to the Locomotives or out of the possession, use and operation thereof by the Railroad during the period when title thereto remains in the Vendor. This covenant of indemnity shall continue in full force and effect notwithstanding the full payment of the purchase price of the Locomotives and the conveyance of the Locomotives or the termination of this Agreement in any manner whatsoever.

8. The Vendor will cause this Agreement, any assignment hereof, and any amendments or supplements hereto or thereto to be filed and recorded with the Interstate Commerce Commission and otherwise as may be required by law or reasonably requested by the Vendor for the purpose of protection of its title to the Locomotives and its rights under this Agreement. If the Locomotives are to be operated outside the United States of America, the Railroad shall prior to such use, to the satisfaction of the Vendor, arrange for the filing, recording or deposit (or any similar action) of all instruments required or advisable to protect the interest of the Vendor in the Locomotives in that jurisdiction.

9. Vendor warrants that the Locomotives subject hereto shall be free from defects in material and workmanship under normal use and service during the term of this Agreement. If, during the term of this Agreement, any part of the Locomotives fails to meet the foregoing warranty and Railroad so informs Vendor upon that failure, Vendor, after verification of the condition of the part and usage, shall make available to Railroad a replacement or repaired part. Railroad shall continue to provide at its expense the labor to remove defective parts and install repaired and replacement parts.

Notwithstanding the generality of the foregoing, Vendor's responsibility shall not extend to defects or damage caused in whole or in part by failure to comply with Vendor's operating and maintenance recommendations, by reason of improper storage or application, by misuse, negligence, accident or improper maintenance, or by repairs or alterations not authorized or approved by Vendor.

This Section sets forth exclusive remedies for claims based on defects in or failures of the Locomotives during the term hereof, whether claim is in contract, warranty, tort (including negligence) or otherwise and however instituted. Upon expiration of the warranty period all such liability shall terminate. The foregoing warranties are exclusive and in lieu of all other warranties, whether written, oral, implied or statutory. NO IMPLIED STATUTORY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR USE SHALL APPLY.

10. Patents. Except in cases of designs, articles and materials specified by the Railroad and not manufactured by the Vendor, or manufactured by the Vendor to Railroad's design, the Vendor shall defend any suit or proceeding brought against the Railroad so far as based on a claim that any Locomotive or any part thereof, furnished under this Agreement constitutes an infringement of any patent of the United States, in notified promptly in writing and given authority, information and assistance (at the Vendor's expense) for the defense of same, and the Vendor shall pay all damages and costs awarded therein against the Railroad. In case said unit, or any part thereof, in such suit is held to constitute infringement and the use of said unit or part is enjoined, the Vendor shall, at its own expense, and at its option, either procure for the Railroad the right to continue using said unit or part; or replace same with non-infringing items; or modify it so that it becomes non-infringing; or take possession of said unit and cancel this Agreement with respect to such unit, effective as of the date on which the Equipment or part is held to constitute infringement in such suit, the Vendor to pay the reasonable cost of returning said unit to Vendor. The foregoing states the entire liability of the Vendor for patent infringement by said unit, or any part thereof during the term of this Agreement.

11. Liability of Vendor Vendor's liability arising out of the furnishing of any Locomotive under this Agreement, or its use, whether the liability is based on contract, warranty, tort (including negligence) or otherwise, will in no case exceed the cost of correcting defects to the Locomotives.

In no case, whether liability arises under breach of contract, warranty, tort, (including negligence) or otherwise, will Vendor's liability include any special, incidental, indirect or consequential damages including, but not limited to, loss of revenue or profits, damages to freight, loss of use of any equipment, cost of capital, downtime costs, or claims of Railroad's customers for such damages.

The foregoing provisions shall not apply to claims of third parties for personal injury (including death) to the extent such injury is directly caused by Vendor's negligence.

12. Default If Railroad breaches or is in default of any material provision of this Agreement and such breach or default is not cured within fourteen (14) calendar days after written notice specifying such breach or default has been given pursuant to the

provisions of this Agreement, then Vendor, at its option, may without prejudice to any other rights or remedies it may have under this Agreement, at law or in equity, do any one or more of the following:

- a. proceed by appropriate court action either at law or in equity, to enforce performance by the Railroad of the applicable covenants of this Agreement or to recover damages for the breach thereof;
- b. terminate this Agreement immediately, whereupon Railroad shall purchase the Locomotives in accordance with the provisions hereof; but the Vendor shall, nevertheless, have the right to recover from the Railroad any and all amounts which under the terms of this Agreement may then be due and owing or which may become due and unpaid (including, but not limited to, rentals of \$500.00 per day per locomotive which shall accrue after the date of termination); and also to recover forthwith from Railroad amounts due pursuant to Section 12 (c) below;
- c. in the event Railroad fails to purchase the Locomotives, Vendor may by its agents enter upon premises of the Railroad or other premises where the Locomotives may be and take possession of all or any such Locomotives and thenceforth hold, possess and enjoy the same free from any right of Railroad, or its successors or assigns, to use the Locomotives for any purposes whatsoever; and to sell and deliver the Locomotives to others upon such terms as Vendor may see fit in its sole discretion, it being understood and agreed that Railroad shall be liable to Vendor for (i) an amount equal to any difference in the price paid by such other parties and the purchase price of the Locomotives, plus (ii) an amount equal to all expenses incident to such sale, including but not limited to the expenses of withdrawing the Locomotives from the service of the Railroad, providing for the care and custody of such Locomotives, preparing such Locomotives for sale and selling the same. Railroad shall pay from time to time upon demand by Vendor the foregoing amounts.

The remedies and powers in this Agreement provided in favor of Vendor shall not be deemed exclusive, but shall be cumulative, and shall be in addition to all other remedies and powers in its favor existing at law or in equity and each and every remedy and power may be exercised from time to time and simultaneously and as often and in such order as may be deemed expedient by Vendor. Railroad hereby waives any mandatory requirements of law, now or hereafter in effect, which might limit or modify any of the remedies herein provided, to the extent that such waiver is permitted by law. No delay or omission of Vendor in the exercise of any remedy or power, no granting of an extension of time for the making of any payment due hereunder or other indulgence and no exercise of any remedy or power shall impair any such remedy or power or the rights under this Agreement or shall constitute a waiver of any breach or default or an acquiescence therein. In the event that Vendor shall bring suit and be entitled to judgment hereunder, then Vendor shall be entitled to recover reasonable expenses, including attorney's fees and the amount thereof shall

be included in such judgment.

As used in this Section, a breach or default of a material provision of this Agreement shall include, but not be limited to, the following:

- (i) failure to pay any amounts hereunder when due;
- (ii) Railroad's making or suffering, voluntarily, by operation of law or otherwise, any unauthorized assignment, encumbrance or transfer of this Agreement or any interest therein or any right granted thereunder, and shall fail or refuse to cause such assignment, encumbrance or transfer to be canceled by agreement of all parties having any interest therein;
- (iii) any proceedings shall be commenced by or against Railroad for any relief under any bankruptcy or insolvency laws, or laws relating to the relief of debtors, readjustments or indebtedness, reorganizations, arrangements, compositions or extensions.

13. The terms of this Agreement and all rights and obligations hereunder shall be governed by the laws of the Commonwealth of Pennsylvania; provided, however, that the parties shall be entitled to all rights conferred by Section 11303 of the Interstate Commerce Act.

14. This Agreement, which is dated for convenience as of November 9, 1989, may be executed in any number of counterparts, each of which shall be deemed to be an original, and such counterparts together shall constitute a single instrument.

IN WITNESS WHEREOF, each of the parties hereto pursuant to due corporate authority, has caused this instrument to be duly executed in its corporate name by its officers, thereunto duly authorized, all as of the date first above written.

General Electric Company

By Michael L. D. Howell

Name: M. W. D. HOWELL

Title: GENERAL MANAGER

Date: Nov 9, 1989

The Monongahela Railway Company

By David A. Caldwell

Name: David A. Caldwell

Title: Comptroller

Date: November 9, 1989

Schedule A
to
TEMPORARY USER AGREEMENT

Dated as of November 9, 1989

between

General Electric Company

and

The Monongahela Railway Company

Type of Equipment: 2300 HP Super 7 B23 diesel electric locomotives.

AAR Symbol: B-B

Quantity: 11

Railroad Numbers: MONONGAHELA 2300-2310

Estimated Unit Price: \$841,100

Estimated Total Price: \$9,252,100

Delivery: Brownsville, PA

Schedule B

CERTIFICATE OF INSPECTION AND ACCEPTANCE

The undersigned, a duly authorized representative of The Monongahela Railway Company (the "Railroad"), for the purpose of inspecting equipment that is to become subject to a Temporary User Agreement dated November 9, 1989, between the Railroad and General Electric Company, (the "Equipment Agreement"), and which is ultimately to become subject to permanent financing arrangements of the Railroad, hereby certifies that the following described Locomotive

Description: 2,300 hp SUPER 7 B23 Diesel Electric Locomotive

Manufacturer: General Electric Company

Road Number:

Delivered at:

appears to be in good order and condition and to conform to the requirements of the "Contract for Super 7 B23 Locomotives," and has been delivered to and have been inspected and accepted on behalf of the Railroad pursuant to the "Contract for Super 7 B23 Locomotives" as of the date indicated below.

Authorized Representative of The Monongahela Railway Company

Dated:

STATE OF *Pennsylvania* }
COUNTY OF *Fayette* } SS

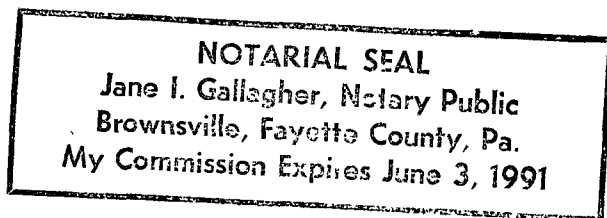
On this 9 day of November, 1989, before me personally appeared David A. Caldwell, to me personally known, who, being by me duly sworn, did say that he is Comptroller of The Monongahela Railway Company, that the instrument was signed on behalf of such corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of such corporation.

Jane I. Gallagher

Notary Public

My commission expires:

June 3, 1991



COMMONWEALTH OF PENNSYLVANIA

COUNTY OF ERIE

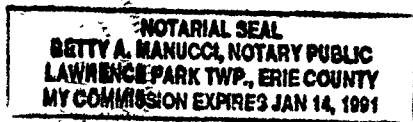
)
:
) ss.

On this 16 day of November, 1989, before me personally appeared M.W.D. Howell, to me personally known, who, being by me duly sworn, did say that he is a General Manager of General Electric Company, that the instrument was signed on behalf of such corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of such corporation.



Notary Public

My commission expires:



Member, Pennsylvania Association of Notaries